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January 17, 2013

VIA HAND DELIVERY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals II
445 – 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Dear Ms. Dortch

Transmitted herewith are an original and four copies of a "Request for Commission Action on Petition for Reconsideration." The instant "Request" pertains to MB Docket No. 03-185 and the failure of the Commission to address a Petition for Reconsideration timely filed in August, 2011.

Yours very truly



Robert B. Jacobi

RBJ:btc

Enclosures

cc: Peter Tannenwald, Esq.

FILED/ACCEPTED

JAN 17 2013

Federal Communications Commission
Office of the Secretary

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BEFORE THE
Federal Communications Commission
Washington, D.C. 20554

FILED/ACCEPTED
JAN 17 2013
Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Amendment of Parts 73 and 74 of the)
Commission's Rules to Establish Rules) MB Docket No. 03-185
for Digital Low Power Television,)
Television Translator, and Television)
Booster Stations and to Amend Rules for)
Digital Class A Television Stations)

To: Office of the Secretary
Attention: The Commission

**REQUEST FOR COMMISSION ACTION ON PETITION
FOR RECONSIDERATION**

Cohn and Marks LLP, on behalf of its clients holding Construction Permits for new low-power television stations, timely filed a Petition for Reconsideration and/or Clarification of the Second Report and Order in the matter of "Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television . . . Stations . . .", 26 FCC Rcd 10732 (2011).¹ Copies of the Cohn and Marks Petition, a Reply pleading to the Opposition of National Public Radio, Inc. and a Supplement to the Reply are herewith attached as Appendix A.

The substance of the Cohn and Marks filings (briefly stated) was as follows:

1. The rationale set forth in the Second Report and Order for granting an extension to September 1, 2015 for existing analog LPTV stations to construct digital LPTV facilities is equally applicable (in all

¹ The Second Report and Order was released on July 15, 2011. The Cohn and Marks Petition was filed on August 5, 2011.

respects) to permittees holding only digital LPTV Construction Permits;²

2. No explanation for the different treatment and the relevance of those differences (if any) justifying the exclusion of permittees holding only digital LPTV Construction Permits was provided in the Second Report and Order.³
3. The failure to explain the reasons for different treatment of digital LPTV permittees violates an explicit mandate set forth in the Melody Music proceeding, Melody Music Inc v. Federal Communications Commission, 345 F.2d 730, 732-733 (1965).⁴

Counsel is aware that the Commission approach to the “different treatment”/relevance is to encourage digital permittees to “. . . seek an extension of their construction permit pursuant to the procedures set forth in Section 74.788(c) of the rules”.⁵ However, neither footnote 37 nor Section 74.788(c) provides reasons for the different treatment or the relevance of the factual differences. In short, the Commission policy excluding digital permittees from the September, 2015 construction permit expiration date VIOLATES Melody Music. The verbiage in footnote 37 “We note that this change in expiration date applies only to digital construction permits for existing

² Second Report and Order, *supra*, pp. 736-740, paras. 8-11, 14. See also, Petition for Reconsideration (Appendix A).

³ Footnote 37 states “We note that this change in expiration date applies only to digital construction permits for existing stations’ flash-cut or digital companion channel facilities. Construction permits for new, digital-only facilities shall continue to be granted for a three-year term and permittees may seek an extension of that construction permit pursuant to the procedures set forth in Section 74.788(c) of the rules.

⁴ “We think the Commission’s refusal to at least to explain its different treatment of Appellant and NBC was error. . . Whatever action the Commission takes on remand, it must explain its reasons and do more than enumerate factual differences, if any, between appellant and the other cases; it must explain the relevance of those differences to the purpose of the Federal Communications Act.”

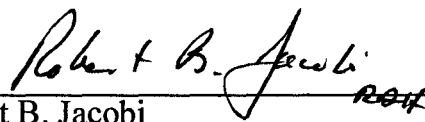
⁵ The “authority” delegated to the Media Bureau in Section 74.788(c) of the rules pertaining to extension of time requests is limited to LPTV analog licensees holding construction permits accorded the September 1, 2015 expiration date. Moreover, the extension grants to the digital permittees were for six months, a time span prior to the September 1, 2015 construction permit expiration date.

stations' flash-cut or digital companion channel" is not an explanation for the different treatment accorded to digital permittees nor an explanation for the relevance of those differences – factors mandated by Melody Music, supra.

The Commission's arbitrary resort to allow digital permittees to file extension requests does not cure the fact that the rule/policy violates the law. The Second Report and Order provides no basis justifying different treatment between analog LPTV licensees and digital-only LPTV permittees. Digital-only LPTV permittees and analog licensees share the same rationale underlying construction permit extensions to September 1, 2015 and, therefore, digital permittees are entitled to the same treatment as analog LPTV licensees, i.e., extensions to September 1, 2015 – without having to file an extension request prior to May 1, 2015 (Section 74.788(c)(3)).

The Cohn and Marks LLP "Request" was filed in August, 2011. The Commission has an obligation to address pleadings and to abide by outstanding case precedent.

Respectfully submitted

A handwritten signature in cursive script, reading "Robert B. Jacobi", followed by a horizontal line and the word "re:4" in small letters.

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Counsel to Channel 51 of San Diego, Inc.

Dated: January 17, 2013

APPENDIX A

COPIES OF PREVIOUSLY FILED PLEADINGS

BEFORE THE
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Parts 73 and 74 of the
Commission's Rules to Establish Rules
for Digital Low Power Television,
Television Translator, and Television
Booster Stations and to Amend Rules for
Digital Class A Television Stations

MB Docket No. 03-185

FILED/ACCEPTED

AUG -5 2011

To: **Office of the Secretary**
Attention: The Commission

Federal Communications Commission
Office of the Secretary

PETITION FOR RECONSIDERATION AND/OR CLARIFICATION

Cohn and Marks LLP, on behalf of various of its clients, hereby requests, pursuant to Sections 1.106 and/or 1.108 of the rules, reconsideration and/or clarification of the Second Report and Order in the matter of amendment of Parts 73 and 74 of the rules to establish rules for digital low power television, television translator and television booster stations (FCC 11-110) in MB Docket No. 03-185, released July 15, 2011 (hereinafter "Second Report and Order"). In support thereof, the following is set forth.

The Commission extended through September 1, 2015 the digital LPTV construction permits of existing analog stations (hereinafter "licensees") which were acquired by filing digital flash cut or digital companion channel applications. Construction permits for new, digital-only LPTV facilities (hereinafter "permittees"), however, were limited to a three-year term and the right to seek an extension of the

construction permit pursuant to Section 74.788 (c) of the rules. Second Report and Order at fn. 37.¹

The Second Report and Order specifically identifies the rationale (the factors) for the automatic extension of construction permits held by existing analog LPTV stations as follows:

- (a) “We agree that it would be preferable for these stations not to have to make the significant investment required for conversion to digital facilities, when such facilities may have to be substantially modified due to channel displacement or taken off the air altogether in connection with the implementation of a spectrum repacking scheme” (Id. at Para. 8);
- (b) “A deadline four years in the future will give these low power television stations time to determine the best location. . . prepare and file an application, obtain a grant of their construction permit, order equipment. . . and carry out other necessary steps toward the transition” (Id. at Para. 9);
- (c) “. . . we seek to bring the benefits of digital broadcast technology to low power television viewers. . . . Adopting a transition date of September 1, 2015 will allow low power television stations to have better understanding of the overall spectrum landscape when determining their final transition plan. . . .” (Id. at Para. 10);
- (d) “. . . we conclude that setting the low power transition date to occur in the middle of the summer will maximize available construction time and minimize weather-related disruptions for low power television stations. . . . A September 1, 2015 transition date will ensure that all low power stations have ample time to complete their facilities prior to the deadline” (Id. Para 11);
- (e) “We conclude that fairness dictates that stations with outstanding digital construction permits set to expire in the coming months or years be given until September 1, 2015 to complete their digital facilities. . . we do not believe that stations should be forced to transition before they are truly prepared to do so simply because their digital construction permits are set to expire. Stations with outstanding construction permits obtained them without knowing the

¹ The rules as amended in the Second Report and Order are not challenged by the instant Petition. The Petition is limited to the Commission’s mandate to exclude construction permits for new, digital-only facilities – as is set forth in footnote 37 of the Second Report and Order.

final timetable for the completion of the digital transition. With a hard deadline now set, those stations should not be penalized. . . rather they should be permitted to revise their digital construction schedule to meet their own financial and market demands” (Id. Para. 14).

All of the above factors which justify an automatic extension to September 1, 2015 for construction permits held by existing analog LPTV licensees are equally applicable to construction permits held by permittees who are not licensees of existing analog LPTV stations.

Underlying the factors identified as justification for the automatic extension to September 1, 2015 is the Commission’s recognition that licensees should not have to make the significant investment for a facility which subsequently may require substantial modification or worse, the possibility that there may be no spectrum available for continued LPTV operation. At paragraph 8, the Commission stated,

“We agree that it would be preferable for these stations not to have to make the significant investment required for conversion to digital facilities, when such facilities may have to be substantially modified due to channel displacement or taken off the air altogether in connection with the implementation of a spectrum repacking scheme.”

Pragmatically, the rationale/factors set forth as justification for automatic licensee extension to September 1, 2015 are equally applicable to permittee “new” facilities,

1. The permittee will be required to make the same “significant investment” as the licensee;
2. The financial risk for licensee “conversion” and for permittee “construction” is identical. There is no substantive difference between “conversion” and “construction”;

3. Both licensees and permittees obtained construction permits "...without knowing the final timetable for the completion. . . .";
4. The benefits arising from "a deadline four years in the future" accorded to licensees would be equally beneficial to permittees;
5. "Fairness" accorded to licensees based on "...we do not believe that stations should be forced to transition... simply because their construction permits are set to expire" is equally applicable to permittees and should be accorded to permittees.

The Commission distinction between digital construction permits held by licensees of analog LPTVs and digital construction permits held by permittees of new LPTV facilities is not supported by the Second Report and Order and, indeed, is wholly irrational. Repacking will be equally destructive to both permittee groups.

The absence of a definitive spectrum impact study and a repacking plan for digital television stations creates great uncertainty for ALL digital LPTV permittees. More significant, the absence is not the fault of the "new" permittees and, therefore, "new" permittees "should not be penalized". The Commission concluded,

"... we do not believe that stations should be forced to transition before they are truly prepared to do so simply because their digital construction permits are set to expire" (Id. at Para. 14).

The same logic applies to permittee construction permits.

Petitioner submits that "fairness dictates" all digital LPTV construction permits should be automatically extended through September 1, 2015, and not just those digital flash-cut or digital companion channel permits of existing analog LPTV licensees.

CLARIFICATION

The matter of obtaining an extension of time pursuant to Section 74.788(c) of the FCC Rules is subject to the “unforeseeable or beyond the licensee’s control where the licensee has taken all reasonable steps to resolve the problem expeditiously” standard. The factual circumstances underlying the need for Clarification include unresolved congressional consideration of spectrum auctions and Commission studies pertaining to repacking – factors unforeseeable and beyond the permittee’s control. The unresolved factual situation (repacking) common to all outstanding LPTV digital permittees requires that either all outstanding LPTV digital construction permits be extended through September 1, 2015 or provision of assurance to permittees of new digital-only LPTV facilities that the filing of an extension application based solely on the delay of the repacking finalization will suffice to satisfy the unforeseeable/beyond control standard.

Respectfully submitted



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Counsel to Channel 51 of San Diego, Inc.

Dated: August 5, 2011

STAMP AND RETURN:
1204.014
✓ 1124.011 Brown

BEFORE THE
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of Parts 73 and 74 of the) MB Docket No. 03-185
Commission's Rules to Establish Rules)
for Digital Low Power Television,)
Television Translator, and Television)
Booster Stations and to Amend Rules for)
Digital Class A Television Stations)

FILED/ACCEPTED

DEC - 8 2011

Federal Communications Commission
Office of the Secretary

To: Office of the Secretary
Attention: The Commission

**REPLY TO NATIONAL PUBLIC RADIO, INC. OPPOSITION
TO COHN AND MARKS LLP PETITION FOR RECONSIDERATION**

The Second Report and Order (26 FCC Rcd 10732 (2011)) established a "hard date" (September 1, 2015) for the completion of low power television (LPTV) to digital and granted only to existing LPTV analog licensees holding digital construction permits automatic extension of the outstanding constructions to September 1, 2015. The reasons for granting the automatic extension are set forth in paragraphs 7-11, 14 of the Second Report and Order, Ibid., pages 10735-740. Briefly stated, the reasons for granting the extension were as follows:

Paragraph 7: completion of full-power television transition;

- Paragraph 8: the financial risks, "... when such facilities may have to be substantially modified due to channel displacement or taken off the air altogether in connection with the implementation of a spectrum repacking scheme."¹
- Paragraph 9: to provide sufficient time for LPTV stations "... to determine the best location," to file modification applications (and the time period associated with modification), to complete the "... other necessary steps toward the transition";
- Paragraph 10: to ensure the benefits of digital technology and to "... allow low power television stations to have better understanding of the overall spectrum landscape when determining their final transition plan. . .";
- Paragraph 11: the specification of a "hard date" in mid-summer "... will maximize available construction time and minimize weather-related disruptions";
- Paragraph 14: Fairness: "We conclude that fairness dictates that stations with outstanding digital construction permits set to expire in the coming months or years be given until September 1, 2015 to complete their digital facilities... we do not believe that stations should be forced to transition before they are truly prepared to do so simply because their digital construction permits are set to expire."

The above-referenced rationale for the September 1, 2015 extension factually is equally applicable to ALL outstanding LPTV digital construction permit. Indeed, NO REASON for excluding ALL LPTV outstanding construction permits is provided, other than a wholly unsupported footnote (footnote 37), "We note that this change in expiration date applies only to digital construction permits for existing stations' flash-cut or digital companion channel facilities" (Second Report and Order, Ibid., page 10739). The verbiage "We note" IS NOT a reason for limiting the extension and particularly in the

¹ The financial risk for the permittees of new digital facilities is greater than the risk for permittees converting from analog to digital. The transmitter site, the antenna, studio equipment and the transmission line used for analog operation (or portions thereof) potentially can be used for digital operation.

situation where the reasons FOR extension are equally applicable to all outstanding LPTV construction permits.

National Public Radio, Inc. ("NPR") asserts that the permittees of the construction permits excluded from the automatic extension filed applications "...with the understanding that it had 3 years to complete construction" and that "...the 3-year period for constructing a new, digital-only facility is exactly what the permittee expected when it applied to construct the facility." The same "understanding" and the same "expectation" were and are applicable to those permittees who filed applications to convert from analog to digital. Insofar as "understanding" and "expectation," in-core applicants (neither for conversion from analog to digital nor for a new digital LPTV station) were NOT FOREWARNED as to prospective adverse implementations resulting from spectrum repackaging schemes. The significance of forewarning as a necessity to support Commission policy affecting the out-of-core expiration date is clearly evidenced in the Commission's defense of the out-of-core December 31, 2011 deadline:

"... low power television stations operating in the 700 MHz band [channels 52-59] have been on notice since the release of the Digital LPTV Order in 2004 that they are secondary to commercial wireless and public safety operations.²⁵ Thus, unlike low power television stations with in-core channels that may never face displacement, low power television stations with out-of-core channels have known that they would ultimately be displaced and should have been prepared to make such adjustments." (Second Report and Order, Ibid., p. 10747 (Para. 31)) (Footnote omitted).

The Commission provided NO FOREWARNING to the "new" LPTV applicants. The Second Report and Order provides NO legitimate basis for discriminating between existing LPTV analog/digital permittees and new LPTV digital permittees.

Respectfully submitted

A handwritten signature in dark ink, appearing to read "Robert B. Jacobi", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Brenda Chapman, hereby certify that on this 8th day of December, 2011, a copy of the foregoing "Reply to National Public Radio, Inc. Opposition to Cohn and Marks LLP Petition for Reconsideration" was delivered via first class, U.S. mail, postage prepaid to the following:

Terri Minatra
National Public Radio, Inc.
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001

Scott K. Bergmann
CTIA-The Wireless Association
1400 Sixteenth Street, N.W.
Washington, D.C. 20036

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Counsel for Cellular South, Inc.,
d/b/a CSpire Wireless


Brenda Chapman

1204.014
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STAMP AND RETURN
Brown

BEFORE THE
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of Parts 73 and 74 of the) MB Docket No. 03-185
Commission's Rules to Establish Rules)
for Digital Low Power Television,)
Television Translator, and Television)
Booster Stations and to Amend Rules for)
Digital Class A Television Stations)

FILED/ACCEPTED
DEC 13 2011

To: Office of the Secretary
Attention: The Commission

Federal Communications Commission
Office of the Secretary

**SUPPLEMENT TO REPLY TO NATIONAL PUBLIC RADIO, INC.
OPPOSITION TO COHN AND MARKS LLP PETITION FOR
RECONSIDERATION**

The Cohn and Marks LLP Reply referenced footnote 37 contained in the Second Report and Order (26 FCC Rcd 10732, 10739 (2011)), which stated, "We note that this change in expiration date applies only to digital construction permits for existing stations' flash-cut or digital companion channel facilities." The Cohn and Marks LLP Reply asserted that the verbiage "We note. . ." is not a reason for excluding permittees holding construction permits for new digital LPTV facilities from the automatic extension of construction permits and that the Second Report and Order, Ibid., did not provide a reason for excluding a limited class of LPTV permittees.

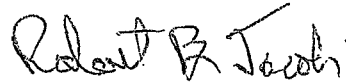
With respect to the Commission's failure to provide a reason for the exclusion, the Commission's attention is directed to a long-standing Court of Appeals decision

mandating that the Commission provide an explanation for its reasons (Melody Music, Inc. v. Federal Communications Commission, 345 F.2d 730, 732-733 (1965):

“We think the Commission’s refusal at least to explain its different treatment of Appellant and NBC was error. . . Whatever action the Commission takes on remand, it must explain its reasons and do more than enumerate factual differences, if any, between appellant and the other cases; it must explain the relevance of those differences to the purpose of the Federal Communications Act.”

“We Note” does not meet the Melody Music mandate. The Second Report and Order, Ibid., failed to enumerate factual differences, failed to provide or explain the reasons for the “We Note” in footnote 37 and failed to explain the reasons for different treatment accorded to the respective classes of permittees contrary to the explicit Melody Music precedent.¹

Respectfully submitted



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Dated: December 13, 2011

¹ Page 3, line 10 of the Reply contains a typographical error: The word “conversation” should be “conversion.”

CERTIFICATE OF SERVICE

I, Brenda Chapman, hereby certify that on this 13th day of December, 2011, a copy of the foregoing "Supplement to Reply to National Public Radio, Inc. Opposition to Cohn and Marks LLP Petition for Reconsideration" was delivered via first class, U.S. mail, postage prepaid to the following:

Terri Minatra
National Public Radio, Inc.
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Scott K. Bergmann
CTIA-The Wireless Association
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Brenda Chapman

CERTIFICATE OF SERVICE

I, Brenda Chapman, hereby certify that on this 17th day of January, 2013, a copy of the foregoing "Request for Commission Action on Petition for Reconsideration" was delivered via first class, U.S. mail, postage prepaid or via hand delivery where indicated to the following:

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